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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 971

ROBERT A. WOODRING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

FRED BERTHOLD,
706 Chestnut Street,
St. Louis 1, Missouri,
Counsel for Petitioner.

NOEL L. ROBYN,
706 Chestnut Street,
St. Louis 1, Missouri,
Associate Counsel for Petitioner.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Robert A. Woodring, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on January 8, 1963, affirming the judgment of the United States District Court for the Eastern District of Missouri and the sentence of imprisonment for violation of 18 U. S. C., § 1341. On February 1, 1963, the Court of Appeals denied a petition for rehearing.

CITATION TO OPINION BELOW.

The judgment of the United States Court of Appeals is printed in Appendix C hereto. The opinion of the United States Court of Appeals is printed in Appendix B hereto, and is reported at 311 F. 2d 417.

JURISDICTION.

Petitioner was tried and convicted on an indictment charging him with violation of 18 U. S. C., § 1341 in the United States District Court for the Eastern District of Missouri. The District Court entered judgment and sentenced him to three years imprisonment. On January 8, 1963, the Court of Appeals for the Eighth Circuit entered its judgment affirming the judgment of the District Court. On February 1, 1963, the Court of Appeals denied a petition for rehearing. On February 26, 1963, the United States Supreme Court ordered that the time for filing a Petition for a Writ of Certiorari be extended to and including April 2, 1963. Petitioner invokes the jurisdiction of this Court to review the opinion and judgment of the Court of Appeals by a writ of certiorari under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

I.

Was Petitioner denied a fair and impartial trial by reason of comments of the trial judge and cross-examination conducted by the trial judge of Petitioner and his witnesses which the Court of Appeals characterized as injudicious, unnecessary, to a degree improper, and as exceeding the bounds of judicial propriety, but nevertheless not prejudicial.

II.

Was Petitioner prejudiced and deprived of a fair trial by the dismissal during trial of Count 6 without his consent, a clear violation of Rule 48 (a), Federal Rules of Criminal Procedure, which states:

> The Attorney General or the United States Attorney may by leave of Court file a dismissal of an indictment, information or complaint and the prosecution shall

thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

STATUTE INVOLVED.

Rule 48 (a) of the Federal Rules of Criminal Procedure states as follows:

> "The Attorney General or the United States Attorney may by leave of Court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

STATEMENT.

Petitioner was charged by a United States grand jury in a seven count indictment, the first six counts of which alleged use of the mails to defraud in violation of 18 U. S. C., § 1341. The seventh count alleged use of an interstate telephone call to defraud in violation of 18 U. S. C., § 1343 (Appendix A, herein). The jury in the United States District Court acquitted Petitioner on Counts 1, 2, 3, 5 and 7 (Tr. 390). During the trial and at the conclusion of all the evidence (Tr. 388) Count 6 was dismissed on motion of the United States Attorney and without Petitioner's consent, **Woodring v. United States**, 311 F. 2d 417, 418. The jury found Petitioner guilty on Count 4 and the District Judge sentenced him to three years in prison.

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of conviction on January 8, 1963 and on February 1, 1963 denied a rehearing (Appendix B).

The seven counts of the indictment were very similar (Appendix A). At the trial the government used as its

only witnesses the alleged victims. Their testimony was very similar (Tr. 1-205). During the government's case the judge did not participate in examining or cross-examining witnesses.

Almost immediately after Petitioner began his defense, the judge began commenting (Tr. 209), examining and cross-examining Petitioner and his witnesses.

Appendix E sets out selections from the transcript. Petitioner's first witness was Wicks, a former employee of Petitioner (Tr. 208). The Court attacked his credibility because of his difficulty in remembering certain details (Tr. 209, 224-226, 232-233, 236-237—all quoted in Appendix E). The Court was very severe with Wicks because he could not remember the names of customers (Tr. 225).

Petitioner called Mulligan, the attorney who represented Petitioner and his company. The Court's examination of Mulligan is set out in Appendix E (Tr. 248-249, 269). The witness was criticized for not recalling accurately when he started representing Petitioner. The Court severely criticized him for inadvertently referring to a directors' meeting as a shareholder's meeting.

Petitioner took the stand in his own defense. The comments of the Court and cross-examination of Petitioner by the Court are set out in Appendix E (Tr. 317, 339-346, 371, 372-373). Most of this occurred during Petitioner's case in chief. Petitioner was rigorously questioned by the Court and the Court did not permit him to answer and explain, as shown by the following attempted answers by Petitioner:

"Electric, of course, was——" (Tr. 340); "Well, Your Honor, with all respect to the Court, I was in the opinion it was——" (Tr. 341); "Plus 6000——" (Tr. 341); "Your Honor, may I explain that, please? The Court:

I'm not asking you to explain anything" (Tr. 343); "Your Honor, I can explain this here very easily, with my income tax return, and this here. I can explain this very easily. I haven't tried to misrepresent, or I haven't tried to tell the jury anything wrong. 18,000—— The Court: Let me ask you this" (Tr. 343).

The Court implied that Petitioner failed to report income on his personal return (Tr. 342), a crime with which Petitioner was not charged.

The Court implied that Petitioner did not know what he was talking about (Tr. 371), that he was talking about something he was confused about (Tr. 372).

The above three witnesses represented substantially Petitioner's entire case.

REASONS FOR GRANTING THE WRIT.

QUESTION 1.

Petitioner respectfully and earnestly contends that the Court of Appeals for the Eighth Circuit has so far sanctioned the departure by the U. S. District Court from the accepted and usual course of judicial proceedings as to call for the U. S. Supreme Court to exercise its power of supervision (Supreme Court Rule 19).

The Court of Appeals said: "It is true that the judge did interrupt the examination and cross-examination of the defendant and his witnesses on a number of occasions . . . that he made some comments during the trial which reflected skepticism . . . and that some of the questions asked could have come much better from the prosecutor than the court . . . the understanding impatience of the judge . . . does not justify the court's injudicious statements and vigorous cross-examination . . . we cannot approve the practice and must conclude that the extent to which the trial court participated was

unnecessary and to a degree improper . . . while we find that the comments of the trial judge and his participation in the questioning of the defendant and his witnesses exceeded the bounds of judicial propriety . . . while we are convinced here that impropriety has been established, we nevertheless conclude . . . that no prejudice resulted." (Appendix B) **Woodring v. U. S.**, 8 Cir. 1963, 311 F. 2d 417, 420.

This opinion of the U. S. Court of Appeals presents a serious question, one which interests all who believe that a United States judge should be impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested. **Sunderland v. U. S.**, 8 Cir. 1927, 19 F. 2d 202; **U. S. v. Brandt**, 2 Cir. 1952, 196 F. 2d 653, 655. The question: when a U. S. judge presides over his court in the manner described by the Court of Appeals for the Eighth Circuit, is it possible for the jury soberly and fairly to test guilt or innocence; is it possible the defendant's rights will not be prejudiced and that he will be tried as he has a right to expect to be tried in a U. S. court?

Petitioner respectfully suggests that the Court of Appeals was in error in holding that no prejudice resulted. The district judge did not participate in questioning witnesses during the government's case. But almost from the beginning of Petitioner's case, the judge was commenting on the witnesses' memory (Tr. 225), disparaging their testimony—"Is that your story that you want this twelve men over there to believe?" (Tr. 225). "Now it's a sad state of affairs when a member of this Bar, officer of this Court, would sit on this witness stand and tell a jury that" (Tr. 269)—when Petitioner's attorney inadvertently referred to a directors' meeting as a stockholders' meeting. When Petitioner took the stand, the Court's vigorous questioning on many subjects, confused Petitioner and

possibly also the jury. The Court repeatedly interrupted Petitioner's efforts to answer and explain. The Court implied that Petitioner did not report his personal income tax properly (Tr. 342), a matter completely irrelevant to the trial; and then interrupted when Petitioner tried to explain (Tr. 343).

To hold that Petitioner was not prejudiced because the Court's instructions were fair is to regard the jury as an adding machine; if you put the wrong data in the machine you merely pull a lever and remove the error. It is to forget that the jurors were human beings. The impropriety of the Court made an indelible impression, particularly because of the deep respect which most jurors have for U. S. judges. In the eyes of the jury, the judge is the sovereign trying one of his citizens. The judge should then be held to a standard of dignity and impartiality befitting the position he holds. **Starr v. U. S.** (1894), 153 U. S. 628.

QUESTION 2.

The opinion below holds it to be of no moment that the district judge announced: "Let the record show that Court 6 is dismissed" instead of directing a verdict of acquittal. This holding nullifies the second sentence of Rule 48 (a). If a dismissal and acquittal were in all ways equivalent, there would be no reason for the rule to state "Such a dismissal may not be filed during the trial without the consent of the defendant." Once the trial starts jeopardy attaches and any dismissal would be with prejudice. **Clawans v. Rives**, D. C. Cir., 1939, 104 F. 2d 240, 242; **Sanford v. Robbins**, 5 Cir., 1940, 115 F. 2d 435, 438. So there would be no reason for defendant to be consulted.

Petitioner's position is that there is a substantial tactical advantage to a defendant during a trial to have a judgment of acquittal by the court rather than allowing the prosecutor to avoid the judgment of acquittal on one

count by dismissal. This interpretation makes the second sentence meaningful.

In Petitioner's case this would have been very important. The Court of Appeals found it significant that the jury acquitted Petitioner on counts 1, 2, 3, 5, and 7, which dealt with activities much earlier in point of time than count 4 on which he was found guilty. **Woodring v. U. S.**, 311 F. 2d 417, 422. On this basis the jury would have seriously considered a judgment of acquittal by the Court as to count 6 which occurred later than count 4.

This is a matter of great importance. Rule 48 (a) is being interpreted in a way that takes a tactical advantage away from the accused. Every day in federal courts, counts of indictments are being dismissed by the U. S. Attorneys. If the defendant could require the court to acquit instead of giving the prosecutor an easy way out, the defendant would be given the advantage to which the Rule entitles him.

Petitioner respectfully submits that this Rule should be interpreted by the Supreme Court.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

FRED BERTHOLD,
Counsel for Petitioner.

NOEL L. ROBYN,
Associate Counsel for Petitioner.

March 28, 1963.

APPENDIX.

(The Indictment.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,

v.

Robert A. Woodring,
Defendant.

No. 61 CR 129 (2).

The Grand Jury charges:

That on or about March 1, 1959, and continuing through August 31, 1960, the defendant,

Robert A. Woodring,

did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises hereinafter more particularly set forth from the following persons:

William A. Rickert,
Alois Kubernat,
Adam Wekerle,
Vernon F. Buesking,
John T. Curry, Jr.,
Leonard Herman,

and other residents of the United States who could and would be induced by the defendant to purchase stock of, or in the Youngstown Home Improvement Corporation, or

otherwise invest money in said corporation, or contract with the defendant, which said scheme and artifice to defraud so devised and intended to be devised by said defendant was, in substance, as follows:

1. That as a part of said scheme and artifice to defraud, the defendant, Robert A. Woodring, together with Robert W. Woodring and Florence M. Woodring, did on or about March 27, 1959, execute articles of incorporation of the Youngstown Home Improvement Corporation and did cause said articles of incorporation to be filed with the Secretary of State of the State of Missouri on March 31, 1959, and State of Missouri, Number 94816, Certificate of Incorporation to be issued to and in the name of the Youngstown Home Improvement Corporation.

2. That as a further part of said scheme and artifice to defraud, the defendant caused an office to be opened and established at 6215 Natural Bridge Road, Pine Lawn, Missouri, for the Youngstown Home Improvement Corporation.

3. That as a further part of said scheme and artifice to defraud, the defendant would and did cause to be published certain advertisements in the St. Louis Post-Dispatch newspaper published in the City of St. Louis, State of Missouri, which advertisements would and did induce the person to be defrauded to contact the defendant for the purpose of purchasing stock of, or in the Youngstown Home Improvement Corporation, or otherwise investing in said company or contracting with the defendant.

4. That as a further part of said scheme and artifices to defraud, the defendant would and did knowingly make false and misleading promises and representations by means of oral statements, letters, advertisements, books of account and records, as hereinafter set forth, in order to induce the persons to be defrauded to pay cash or negoti-

able securities for stocks of, or in the Youngstown Home Improvement Corporation.

5. That as a further part of said scheme and artifice to defraud, the defendant did induce the persons to be defrauded to sign a certain written contract with Youngstown Home Improvement Corporation wherein it was stated that the defendant sold one percent of his stock in the Youngstown Home Improvement Corporation for the sum of $2,000 to the person to be defrauded and the defendant shall have the first option to re-purchase the said stock for the amount of at least $2,000.

6. That as a further part of said scheme and artifice to defraud, the defendant would and did display books and records of the Youngstown Home Improvement Corporation for the purpose of convincing the persons to be defrauded that the Youngstown Home Improvement Corporation was a reliable and sound firm on which the person to be defrauded could rely.

7. That it was the further part of said scheme and artifice to defraud, to have an interview with the person to be defrauded and to ascertain as one of the first steps in each interview with the persons to be defrauded the amount of cash readily available.

8. That as a further part of said scheme and artifice to defraud, the defendant would and did by means of newspaper advertising, records and account books, written contracts, written and oral representations made for the purpose of inducing the persons to be defrauded to purchase said stock or contract with the defendant and for the purpose of lulling purchasers into a false sense of security, represent to the person to be defrauded, well knowing that said representations would be and were false and fraudulent when made as follows, to-wit:

(a) That the person placing the advertisement in the Post-Dispatch newspaper desired an employee to qualify for a lucrative position, whereas in truth and in fact, as the defendant well knew, the Youngstown Home Improvement Corporation and the defendant, did not desire or need any employee or employees.

(b) That the person placing the advertisement in the Post-Dispatch newspaper desired a partner to invest $2,000 in a business venture, whereas in truth and in fact, as the defendant well knew, no partnership existed or was contemplated.

(c) That the Youngstown Home Improvement Corporation was a large well-established reliable concern, whereas in truth and in fact, it being a corporation organized on or about March 31, 1959, the operation thereof being controlled by the defendant and the assets thereof consisted only of office furniture and supplies, all of which the defendant well knew.

(d) That the cash required of the purchasers of stock or investors in the company was and would be secured by inventory, whereas in truth and in fact, as the defendant well knew, the purchasers or investors had no security, were given none and the Youngstown Home Improvement Corporation carried no inventory, either in machinery or materials, or anything else.

(e) That the purchasers of stock or investors in the Youngstown Home Improvement Corporation would get one percent of the net profits of said company, which profits were stated in exaggerated amount, when in truth and in fact the said purchasers or investors would not and did not receive one percent of the net profits of the company and said company had little or no net profits, as the defendant well knew.

(f) That the purchaser of stock in said company or investor therein would get a salesman's commission of 10% on each job that was sold by said investor and that the amount of sales of said purchaser or investor would net him between $8,000 and $10,000 per year, when in truth and in fact said commission would not and did not total the amounts stated nor was said purchaser or investor paid 10% commission on the jobs sold, all of which the defendant well knew.

(g) That the purchasers of stock or investors in the company would be given at the expense of the company a course in construction, estimating and appraising, at Washington University, St. Louis, Missouri, whereas in truth and in fact, as the defendant well knew, the furnishing of instruction or a course of any kind was not contemplated or in fact furnished after the purchasers' or investors' money was obtained by the defendant.

(h) That certain of the funds invested would be deposited in a bank account subject to the joint signatures of the investor and the defendant, whereas in truth and in fact, as the defendant well knew, said funds were not and would not be so deposited or so controlled.

(i) That the defendant would re-purchase the stock sold to the purchaser or investor, for the sum paid therefor, whereas in truth and in fact the defendant would not and did not intend to repurchase the said stock.

(j) That the value of one (1) share of stock in the Youngstown Home Improvement Corporation had a value of $2,000 based upon inventory of material, equipment and other assets, whereas in truth and in fact, and as the defendant well knew, said stock was of little or no value.

(k) That the no par value stock in the Youngstown Home Improvement Corporation had a value represented

at various amounts up to and including $2,000 per share, whereas in truth and in fact the articles of incorporation and the Certificate of Incorporation of the Youngstown Home Improvement Corporation authorized said company to issue only shares of stock at a par value of $10 per share as the defendant well knew.

(l) That the money paid by the purchaser of stock or investor in the Youngstown Home Improvement Corporation would be delivered to and used by said corporation, whereas in truth and in fact said monies would be and were actually converted by the defendant to and for his own use and benefit.

On or about December 21, 1959, at St. Louis, Missouri, in the Eastern Division of the Eastern District of Missouri in violation of Section 1341, Title 18, United States Code, the defendant,

Robert A. Woodring,

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did knowingly induce and cause William A. Rickert to place in an authorized depository for mail matter in the City of St. Louis, Missouri, a letter adressed to:

Box R-330,
Post Dispatch
St. Louis 1, Missouri

to be and was sent and delivered by the Post Office Department of the United States of America, according to the directions thereon.

Count II.

The Grand Jury realleges all of the allegations of Count I of this indictment except those contained in the last paragraph thereof.

On or about January 4, 1960, at St. Louis, Missouri, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the defendant,

Robert A. Woodring,

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did knowingly induce and cause Alois Kubernat to place in an authorized depository for mail matter in the City of St. Louis, Missouri, a letter addressed to:

Box X-233
St. Louis Post Dispatch

to be and was sent and delivered by the Post Office Department of the United States of America, according to the directions thereon.

Count III.

The Grand Jury realleges all of the allegations of Count I of this indictment except those contained in the last paragraph thereof.

On or about January 4, 1960, at St. Louis, Missouri, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the defendant,

Robert A. Woodring,

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did knowingly induce and cause Adam Wekerle to place in an authorized depository for mail matter in the City of St. Louis, Missouri, a letter addressed to:

Post Dispatch Box X-233
1111 Olive Street
St. Louis 1, Missouri

to be and was sent and delivered by the Post Office Department of the United States of America, according to the directions thereon.

Count IV.

The Grand Jury realleges all of the allegations of Count I of this indictment except those contained in the last paragraph thereof.

On or about June 27, 1960, at St. Louis, Missouri, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the defendant,

Robert A. Woodring,

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did knowingly induce and cause Leonard Herman to place in an authorized depository for mail matter in the City of St. Louis, Missouri, a letter addressed to:

Box A-166
Post Dispatch
St. Louis, Missouri

to be and was sent and delivered by the Post Office Department of the United States of America, according to the directions thereon.

Count V.

The Grand Jury realleges all of the allegations of Count I of this indictment except those contained in the last paragraph thereof.

On or about March 15, 1960, at St. Louis, Missouri, in the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the defendant,

Robert A. Woodring,

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did knowingly induce and cause John T. Curry, Jr., to place in an authorized depository for mail matter in the City of St. Louis, Missouri, a letter addressed to:

St. Louis Post Dispatch
Box M-386
St. Louis 1, Missouri

to be and was sent and delivered by the Post Office Department of the United States of America, according to the directions thereon.

Count VI.

The Grand Jury realleges all of the allegations of Count 1 of this indictment except those contained in the last paragraph thereof.

On or about June 28, 1960, in the City of Pine Lawn, Missouri, within the Eastern Division of the Eastern District of Missouri, in violation of Section 1341, Title 18, United States Code, the defendant,

Robert A. Woodring,

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did place and cause to be placed in an authorized depository for mail matter, a letter from the Youngstown Home Improvement Corporation addressed to:

Mr. John Curry
#6 Rose Court
Florissant, Missouri,

to be sent and delivered by the Post Office Department of the United States of America.

Count VII.

The Grand Jury realleges all of the allegations of Count I of this indictment except those contained in the last paragraph thereof.

On or about December 27, 1959, the defendant for the purpose of executing the aforesaid scheme and artifice to defraud and attempting so to do, did call by telephone from St. Louis, Missouri, or St. Louis County, Missouri, within the Eastern Division of the Eastern District of Missouri, to the City of Edwardsville, State of Illinois, and did have a conversation with Vernon F. Buesking.

In violation of Section 1343, Title 18, United States Code.

A True Bill.

/s/ E. W. Cavanaugh,
Foreman.

/s/ D. Jeff Lance,
United States Attorney.

United States Court of Appeals
For the Eighth Circuit.

No. 17,013.

Robert A. Woodring,
Appellant,
vs.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

January 8, 1963.

Before Vogel and Van Oosterhout, Circuit Judges, and Van Pelt, District Judge.

Per Curiam.

Robert A. Woodring, appellant-defendant herein, was charged by a grand jury in a seven-count indictment, the first six counts of which alleged use of the mails to defraud in violation of 18 U. S. C. A., § 1341. The seventh count charged a violation of 18 U. S. C. A., § 1343, which proscribes fraud by interstate wire, radio or television. At a jury trial commencing on December 4, 1961, and concluding on December 7, 1961, Woodring was acquitted on Counts 1, 2, 3, 5 and 7. During the trial and at the conclusion of the evidence, Count 6 was dismissed on motion of the United States Attorney. The jury found Woodring

guilty on Count 4. He was thereafter sentenced to three years' confinement. This is an appeal from the judgment of conviction.

Two errors are alleged:

"I.

"The Comments and Cross-Examination by the Trial Judge During the Testimony of the Three Chief Defense Witnesses Was Plain Error and Prejudiced the Jury Against Appellant, Deprived Him of a Fair and Impartial Trial and Resulted in His Conviction on Count 4.

"II.

"The Dismissal of Count 6 Immediately Before the Case Was Submitted to the Jury Without Appellant's Consent Prejudiced Appellant's Defense to Count 4 of the Indictment."

The indictment alleged that Woodring, as president of the Youngstown Home Improvement Company, schemed to obtain money by false pretenses. He allegedly induced persons to invest money in Youngstown by falsely representing that: He needed employees and partners, that the company was a profitable and well established concern, successfully operating in the home improvement field, that there existed inventory security for the investments, that the investors would receive large profits and commissions, that they would receive university training, that they would have control of company funds, that the company had substantial value, that he would repurchase stock of any unsatisfied investor, and that the company, not Woodring, was to receive the money thus invested. To carry out this alleged scheme, Woodring placed advertisements in a newspaper which called for answers through the mails. It was also alleged in Count 7 that he made an interstate telephone call soliciting one such investment.

Six persons ultimately invested varying amounts of money in the corporation and received stock in return. Five of these investors came into the company in late 1959 or early 1960. Use of the mails and interstate telephone to defraud as to them was charged in Counts 1, 2, 3, 5 and 7. Woodring was acquitted on all such counts.

The sixth investor was one Leonard Herman. Youngstown had issued but 100 shares of stock. Some of such shares had been sold to those who had invested in late 1959 or early 1960. Dissension between those investors and Woodring developed in the operation of the business by May or June, 1960. Some of the investors had dropped out and were requesting a return of their money. On June 26, 1960, appellant placed an advertisement in the St. Louis Post-Dispatch in the column "Partners Wanted", which read as follows:

> "Man who is honest and sincere and is seeking same with a Gentile partner: I have a very profitable and expanding business but need a partner to expand: $6,000 required; references."

Herman used the mails to respond to Woodring's advertisement. The ensuing negotiations culminated on August 10, 1960, in Herman's paying $6,000 to Woodring for 50 shares of Youngstown in order to become "a full partner" with Woodring. (Prior investors had paid from $1,000 to $2,000 per share.) During the negotiations between Woodring and Herman, Woodring led Herman to understand that the corporation bank account had funds in it exceeding $6,000 and that with Herman's $6,000 the corporation assets would total approximately $12,000. On the day Herman closed the deal by giving Woodring his check for $6,000, the two went to the Lindell Trust Company, where they signed a signature card which provided that their two signatures were necessary to make withdrawals from the account of the Youngstown Home Improvement Corpo-

ration. At that time, there was a balance in the corporation account of $6,504.69. Later that day, without Herman's knowledge or consent, Woodring withdrew the corporation's funds from its checking account, such withdrawal resulting in an overdraft the next day when other checks he had issued were presented for payment. He also deposited Herman's $6,000 in his personal account. At the time of the negotiations between Woodring and Herman, Woodring did not own the remaining 50% of the stock of Youngstown nor did he disclose that fact to Herman. In defense, he claimed he intended to purchase back other outstanding shares so that he and Herman would each own 50%. No evidence of such attempts to purchase was disclosed. On the day following that on which he received and cashed Herman's check and withdrew the corporation's funds from its account, which he claimed were commissions due him, he called Herman on the telephone and told him that his doctor had advised him to take a vacation for health reasons. His explanation to the jury for withdrawing the corporation's funds and keeping Herman's $6,000 was that there was still left $12,000 worth of corporation assets represented by equipment, signed contracts and accounts receivable. Herman had no opportunity to participate in any of the affairs of the company. Business activities of the company appeared to cease completely following his becoming a full partner.

Count 4 of the indictment, on which Woodring was convicted, deals with his transactions with Herman; and Herman having used the mails to respond to Woodring's advertisement in the St. Louis Post-Dispatch. Evidence of Woodring's guilt in connection with the charge contained in Count 4 was most substantial, whereas evidence supporting the charges contained in the other five counts was not nearly so convincing.

It is earnestly contended on behalf of the appellant that he was deprived of a fair and impartial trial by rea-

son of comments made by the trial judge and cross-examination conducted by the trial judge of the defendant and his witnesses. We have read the entire transcript of 388 pages of the witnesses' testimony taken during the trial. It is true that the judge did interrupt the examination and cross-examination of the defendant and his witnesses on a number of occasions. It is also true that he made some comments during the trial which reflected skepticism with reference to the statements made by some of the witnesses and their willingness to make fact disclosures and that some of the questions asked could have come much better from the prosecutor than the court. In only one instance was an objection made to the trial judge's questioning or to his comments. On that one occasion the judge had chided the defendant for not reading correctly to the jury from a document which he held in his hands. It was obvious that the defendant was not quoting accurately. We think it fair to say, however, that generally the trial judge's purpose in interjecting himself into the examination of the defendant and his witnesses had for its objective the clarification of facts for the jury in a case where some of those testifying were forgetful, obtuse or uncooperative. However, the understanding impatience of the judge with a witness who misreads a document he holds in his hand, a witness who testifies that **from his own knowledge** the company had orders for "better than a hundred thousand dollars", which latter statement is disclosed upon the court's questioning to be based solely upon a hearsay statement of the defendant himself, and a witness who was lax in preparation and careless in statement does not justify the court's injudicious statements and vigorous cross-examination as disclosed by the record before us here. We cannot approve the practice and must conclude that the extent to which the trial court participated was unnecessary and to a degree improper. See **Hargrove v. United States**, 8 Cir., 1928, 25 F. 2d 258.

While we find that the comments of the trial judge and his participation in the questioning of the defendant and his witnesses exceeded the bounds of judicial propriety, we must nevertheless also conclude that such activities prejudiced the defendant before a new trial may be ordered on such grounds. As Judge John Sanborn expressed it for this court in **Goldstein v. United States**, 8 Cir., 1933, 63 F. 2d 609, 613:

> "* * * An appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent the jury fro exercising an impartial judgment upon the merits."

See also **United States v. Aaron**, 2 Cir., 1951, 190 F. 2d 144, certiorari denied **Freidus v. United States**, 1951, 342 U. S. 827, 72 S. Ct. 50, 96 L. Ed. 626; **Garber v. United States**, 6 Cir., 1944, 145 F. 2d 966; **Hargrove v. United States**, 8 Cir., 1928, 25 F. 2d 258. While we are convinced here that impropriety has been established, we nevertheless conclude, for the reasons hereinafter stated, that no prejudice resulted.

At no time during the presentation of the testimony or during his charge to the jury did the trial judge here express an opinion as to the facts nor did he comment directly upon the witnesses and their testimony, although it was his prerogative so to do. **Buchanan v. United States**, 8 Cir., 1926, 15 F. 2d 496; **Quercia v. United States**, 1933, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321, where the court stated at page 469 of 289 U. S.:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. **Herron v. Southern**

Pacific Co., 283 U. S. 91, 95: In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. **Carver v. Jackson**, 4 Pet. 1, 80; **Vicksburg & Meridian R. Co. v. Putnam**, 118 U. S. 545, 553; **United States v. Philadelphia & Reading R. Co.**, 123 U. S. 113, 114; **Capital Traction Co. v. Hof**, 174 U. S. 1, 13, 14; **Patton v. United States**, 281 U. S. 276, 288."

See **McCoy v. Blakely**, 8 Cir., 1954, 217 F. 2d 227, 233; **United States v. Rosenberg**, 2 Cir., 1952, 195 F. 2d 583, 593-595; **Stokes v. United States**, 8 Cir., 1920, 264 Fed. 18, 25; **United States v. Worcester**, D. C. Mass., 1961, 190 F. Supp. 548, 561.

The judge's charge to the jury in this case is a model of studied impartiality. He carefully directed attention to the contentions of both parties without emphasizing one over the other and without in any manner whatsoever indicating any opinion as to such contentions or the witnesses offered in support thereof. He clearly, emphatically and at length and on a number of occasions pointed out that it was the sole responsibility of the jury to determine the credibility of the witnesses and the weight that should be given to their testimony. Additionally, as if to destroy any possible prejudice from his having participated in the cross-examination of witnesses and from his comments, he said:

"During the course of the trial I occasionally ask questions of a witness in order to bring out facts not

then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions relate. Remember that at all times that you as jurors are at liberty to disregard all comments of the court in arriving at your finding as to the facts.

"If in the course of these instructions, and if during the trial, I have said anything that indicates to you how the court might feel, or how you think the court feels with respect to the testimony in this case, and that opinion is different from your opinion of the testimony, you are to accept your opinion of the testimony rather than the court's, because it is your sole province to pass on the testimony, and from the testimony you pass on the credibility of the witnesses, and with that the court has nothing to do, just as you, as members of the jury, have nothing to do with determining what the law is in this case."

If there was error in the judge's participation in the trial, we are forced to conclude that by his meticulously careful charge the effects of such error were dissipated and that no prejudice resulted. See **Garber v. United States**, 6 Cir., 1944, 145 F. 2d 966, 971-974; **United States v. Aaron**, supra.

Additionally, it is manifest here that the jurors gave careful consideration to the evidence and arrived at their own conclusions. This is clearly indicated from the fact that on Counts 1, 2, 3, 5 and 7 they found the defendant not guilty—this in spite of the fact that most, if not all, of the judge's questions were directed to activities concerned in such particular counts. All of the activities dealt with in Counts 1, 2, 3, 5 and 7 were much earlier in point of time than those with which Count 4, on which the defendant was found guilty, were concerned. It could very well be that under the court's careful instructions with reference to criminal intent the jurors concluded that

as to Counts 1, 2, 3, 5 and 7 the government had failed to establish that essential element which is a prerequisite to a determination of guilt, but that as to Count 4, which concerned activities immediately before the company ceased doing business, the intent to defraud had been established. The evidence offered fully justifies such conclusions.

The defendant cites to us a number of cases in which reversal was had partly because the trial judge participated in the examination of witnesses to an improper degree, thereby departing from that impartiality to be expected of a judge on the bench. In **United States v. Brandt**, 2 Cir., 1952, 196 F. 2d 653, a reversal and new trial were required, both because of the judge's conduct during the course of the trial as well as the nature of his charge to the jury. The "cumulative effect" of the trial judge's participation in the prosecution through the asking of more than 900 questions during an eight-day trial and error in the charge by informing the jury that he had refused defense counsel's requested charge on the import of certain honest disclosures the defendants had made during an investigation by the Postal authorities obviously called for a reversal. In the opinion, however, the Court of Appeals of the 2nd Circuit stated, at page 655:

> "A trial judge conducting a case before a jury in the United States courts is more than a mere 'moderator,' Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321; Montrose Contracting Co. v. Westchester County, 2 Cir., 94 F. 2d 580, 587, certiorari denied Westchester County v. Montrose Contracting Co., 304 U. S. 561, 58 S. Ct. 943, 82 L. Ed. 1529, but he is decidedly not a 'prosecuting attorney,' United States v. Guertler, 2 Cir., 147 F. 2d 796, certiorari denied 325 U. S. 879, 65 S. Ct. 1553, 89 L. Ed. 1995; Hunter v. United States, 5 Cir., 62 F. 2d 217, 220. He

enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues. Pariser v. City of New York, 2 Cir., 146 F. 2d 431. To this end he may call witnesses on his own motion, adduce evidence, and himself examine those who testify. See United States v. Marzano, 2 Cir., 149 F. 2d 923; Guthrie v. Curlett, 2 Cir., 36 F. 2d 694; Young v. United States, 5 Cir., 107 F. 2d 490, 493; 3 Wigmore on Evidence, § 784, 3d Ed. 1940. But he nonetheless must remain the judge, impartial, judicious, and, above all responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested."

Among others, appellant also relies on **United States v. De Sisto**, 2 Cir., 1961, 289 F. 2d 833. Therein a new trial was required because the trial judge indulged in extensive questioning of defendant and his witnesses and also repeatedly belittled the efforts of one of the defendants to establish an alibi. In that case, the judge asked 3,115 questions of all witnesses. The prosecutor asked but 1,381, defense counsel 3,330. The judge's questions to the defendant De Sisto totalled 306, the prosecutor's 347, and defense counsel's, 201. After referring to these figures, the court stated, at pages 834-835:

"• • • It is indeed an impressive proportion, but no such mathematical computation is of itself determinative. However, taking all this in conjunction with the long and vigorous examination of the defendant himself by the judge, and the repeated belittling by the judge of defendant's efforts to establish the time that Fine left the pier, we fear that in its zeal for arriving at the facts the court here conveyed to the jury too strong an impression of the court's belief in the defendant's probable guilt to permit the jury freely to perform its own function of independent

> determination of the facts. United States v. Brandt, supra, 196 F. 2d at page 656. We do not feel that it was possible to remove the impression by the instructions given in the charge."

Agreeing with what the court said in **De Sisto**, we still do not find that its determination of that case requires a reversal here. The situations are by no means comparable.

We have considered all of the cases cited in behalf of the appellant and find them to be distinguished on the facts or to involve other substantial errors in themselves necessitating reversal. Here, after a careful consideration of the entire record, we conclude there was error but no resulting prejudice.

Appellant's second claim of error is based upon the court's "dismissal" of Count 6 before the case was submitted to the jury and without appellant's consent. Count 6 charged that on or about June 28, 1960, Robert A. Woodring, for the purpose of executing a fraudulent scheme, placed or caused to be placed in an authorized depository for mail matter a letter from the Youngstown Home Improvement Corporation and addressed to "Mr. John Curry, #6 Rose Court, Florissant, Missouri", to be sent and delivered by the Post Office Department of the United States. The record does not disclose what was said with reference to Count 6, but appellant states in his brief as follows:

> "At the conclusion of all of the evidence the Court, out of the hearing of the jury, and off the record, stated to government counsel at length that Count 6 of the indictment should be dismissed. The prosecution thereupon stated that it would dismiss Count 6 of the indictment. Appellant's counsel took no part in this discussion but did not object.
>
> "The record shows only the Court's statement 'Let the record show that Count 6 is dismissed.'"

Appellant cites and relies on Rule 48 (a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., which provides as follows:

> "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

While the record does not disclose the court's reason for dismissing Count 6, it is perfectly obvious that it did so because the testimony offered by the government failed to substantiate the charge alleged in Count 6 and had the defendant been found guilty thereon, the court would have had to set aside the conviction as not being based on substantial testimony. That being so, it was the court's duty to direct an acquittal as to such count. That he directed that Count 6 be "dismissed" instead of directing an acquittal we think of no moment, for obviously the dismissal was with prejudice, the appellant having been placed in jeopardy in connection with Count 6. In any event, there could not possibly be prejudice to the defendant unless he was subsequently reindicted for the same charge alleged in Count 6. Having been placed in jeopardy in connection with that charge once, the government could not, of course, succeed in such reindictment.

The purpose of Rule 48 (a), F. R. C. P., 18 U. S. C. A., is to protect a defendant from harassment by the government through charging, dismissing and then re-charging without placing a defendant in jeopardy. If a trial has been commenced, a defendant has a right to insist upon a disposition on the merits and may properly object to a dismissal without prejudice. The second sentence of Rule 48 (a) is merely a restatement of pre-existing law. Here at the close of the government's testimony defendant

moved for an "acquittal" on all seven counts of the indictment, making particular reference to Count 6 as follows:

> "As further ground for said motion, defendant alleges that the government's evidence affirmatively shows that such a scheme to defraud did not exist at the time of the mailing of the letter set out in Count 6 of the indictment * * *."

The Court reserved ruling, but at the close of all the testimony directed that Count 6 be "dismissed." Immediately after the court stated in front of the jury, "Let the record show that Count 6 is dismissed.", the defendant moved the court to "dismiss Counts 1 through 5 of the indictment * * *" and "that the court dismiss Count 7 of the indictment * * *", thereby urging like action as to all remaining counts. We see no possible prejudice to the defendant on this point.

We have examined the entire transcript here with care and are of the opinion that the defendant had a fair and impartial trial, that substantial testimony justifies his conviction on Count 4 of the indictment and that the judgment of conviction should be affirmed.

Judgment.

United States Court of Appeals
for the Eighth Circuit.

No. 17,013.

Robert A. Woodring, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

January 8, 1963.

Entered in accordance with opinion.

Clerk, U. S. Court of Appeals, 8th Circuit.

United States Court of Appeals
for the Eighth Circuit
St. Louis 1, Mo.

Robert C. Tucker, Clerk

February 14, 1963

Mr. Noel L. Robyn,
426 Title Guaranty Bldg.,
St. Louis 1, Missouri.

Dear Mr. Robyn:

Re: No. 17013. Robert A. Woodring,
v. United States.

Your letter of February 13th has been received enclosing check in the sum of $3.50 to cover Clerk's fee for preparing certified transcript of record for use in the Supreme Court with application for certiorari in the above case. Receipt for the remittance is enclosed herewith.

The certified record consisting of the four volumes of the Original Files of the District Court and one volume containing proceedings in this Court is being sent today to the Clerk of the Supreme Court at Washington, D. C. We enclose to you a copy of the judgment of this Court entered on the opinion which may be needed in the preparation of your application for the writ of certiorari.

Very truly yours,

Robert C. Tucker,
Robert C. Tucker,
Clerk.

G.

Encs.

APPENDIX E.

Quotations From Transcript.

"A. I believe I started—I believe I started around a hundred a week. I'm just going back in my memory for two years. It's a little difficult. Approximately a hundred dollars a week up to one hundred fifty, which——

The Court: It hasn't been two years. It hasn't even been a year and a half hardly. This is '61" (Tr. 209).

* * * * * * * *

"Q. All right, sir, I'll direct your attention to the month of May of 1960. Do you recognize any of the jobs listed there, sir?

A. McPheeters, I recognize that name. Benson, that sounds familiar.

The Court: Will you speak up? I can hardly hear you and the gentleman down on the end has to hear you. What was the first one?

The Witness: McPheeters sounds familiar and so does Benson. Hobalt sounds very familiar.

The Court: You mean to tell this jury that 15 months ago, with all this great work that you say they were doing, this hundred thousand dollars worth, that you can't even tell them one job without a name maybe sounding familiar? You came all the way back here from Idaho to tell them that? Is that your story that you want this twelve men over there to believe?

The Witness: No, sir.

The Court: Then why don't you tell them if you know?

The Witness: Well, I actually don't recall the names, sir. I never could remember a name very long.

The Court: Well, you remembered figures a while ago very well. Where did you get the hundred thousand dollar figure?

The Witness: I remember seeing it here at the time in the office.

The Court: You saw it. What did you see it in?

The Witness: I heard it.

The Court: Oh, you heard it. Who did you hear it from, from the defendant?

The Witness: Well, yes, sir.

The Court: And that's what you're basing your hundred thousand dollars on?

The Witness: Well, yes, sir.

The Court: How much work did you say that you did out there, the job that was under you? You were there, you say, for two and a half months.

The Witness: I have no way of knowing that, sir. I never saw the contracts on the jobs.

The Court: You're the man who was doing all this supervision and got control of all these engineers and know all about drawing plans and so on, and you can't tell this jury anything about how much work you supervised?

The Witness: It's a little difficult at the time for me to recall, your Honor.

The Court: Thank you, you can proceed" (Tr. 224-226).

* * * * * * * *

"The Court: You didn't draw that, did you?

The Witness: Yes, sir, I drew this one. Dated 5-11-61.

The Court: I thought you said they were working on that job when you got there.

The Witness: The best of my knowledge, sir. This is dated 5-11-61.

The Court: I understand that you got that date on there, but you previously testified, as I understood you to say, that they were working on that job when you got there.

The Witness: I don't know, it might have been one of the jobs I mentioned. Details, so many jobs I've worked

on with them here, it's a little difficult to recall it, in too much detail, that great amount of time ago.

The Court: Let me ask you one question. Were those drawn after the jobs were obtained or beforehand?

The Witness: These were drawn after the job was obtained.

The Court: After you got the job then you drew these?

The Witness: No, sir.

The Court: You never drew them before you got the job?

The Witness: Made some preliminary sketches for some of the jobs that the people were interested in, what it would look like, but this wasn't one of them.

The Court: I know that wasn't one of them. You said those twelve. I'm asking about all twelve of them. Are all twelve of those jobs that you had or some of them preliminary sketches?

The Witness: These are all of the ones we had, sir.

Mr. and Mrs. H. J. Holloran. This is one job that was completed.

This one was a preliminary sketch of a proposed room addition.

The Court: Then what you said a while ago when I asked you isn't true, then, is that right?

The Witness: What is that, sir?

The Court: I asked you a while ago if all twelve of those—if any of those were preliminary sketches and you said no.

The Witness: I don't know, to the best of my knowledge, sir. I haven't looked at all of them.

The Court: You didn't tell me to the best of your knowledge. I asked you if you knew and you said no. That is a preliminary sketch?

The Witness: This one is, sir, yes, sir. That is just a preliminary sketch, this one right here (indicating)" (Tr. 232-233).

* * * * * * *

"Q. And I believe you told us that that job was completed while you were there?

A. No, sir, this is one I do not recall having finished.

The Court: You previously testified that you completed it while you were there, to refresh your memory.

The Witness: Excuse me, sir.

The Court: You previously testified on redirect that you completed it while you were there, to refresh your memory, at least that's what I had down here, and I was trying to write down what you said about it.

The Witness: I don't recall this one, sir. I must have made a mistake on this one, sir. I don't remember.

The Court: I could be wrong about it, but that's what I marked down.

Mr. Martin: So did I, your Honor.

The Court: The jury has to keep up with what you said.

Mr. Bigler: My recollection is there were two of those Holloran jobs" (Tr. 236-237).

* * * * * * * *

"The Court: Wait just one minute.

You just got through saying that you represented the company from September, October, 1959. Now, this would be months before you got into it if your previous testimony is true.

The Witness: My previous testimony is not correct, your Honor. I represented Mr. Woodring from the very beginning when this corporation was formed. I had also represented him in business prior to that, so then I would have to correct my testimony to show that I represented him probably from about February.

The Court: Didn't you know, John, you were going to testify here this morning?

The Witness: Your Honor, the subpoena was served on me at exactly 9:47 this morning. I am now in trial in Division 6 of the City Circuit Court.

The Court: Didn't you have any idea they were going to subpoena you?

The Witness: I didn't know it was going to be this morning, no, your Honor.

The Court: Didn't you take a look at any of your records so you could tell this jury what had happened instead of just merely guessing?

The Witness: No, your Honor, I did not, I wasn't expecting to be called this morning. I have the records in my office, but I'm in trial this morning, have been in trial for two days.

The Court: I understand you're in trial for two days, but I would assume that you had some suspicion they were going to call you, and that you would look at your records. You certainly had some idea they were going to ask you about that.

You can continue" (Tr. 248-249).

* * * * * * * *

"Q. Have you ever seen any minutes of any shareholders' meeting as distinguished from a directors' meeting?

The Court: Let me ask you this, John. You're an attorney, and you're in a little different situation from most people. You specifically told Mr. Bigler, when he asked you, that you held the stockholders' meeting. Now, it's a sad state of affairs when a member of this Bar, officer of this Court, would sit on this witness stand and tell a jury that, and you had that right in front of you when you told him, and now you're saying that you never held a stockholders' meeting.

The Witness: Your Honor, I certainly didn't mean to misrepresent in any way——

The Court: Well, the least you can do is listen to the questions.

The Witness: Yes, sir.

The Court: Because you understand them. You're supposed to be a halfway expert in the field" (Tr. 269).

* * * * * * *

"A. The year 1960, we had a great potential for making a profit, but due to the non-cooperation of the individuals I brought——

The Court: That isn't what he asked you. Don't argue with him and make a speech. He asked you if you made a profit and the answer to that is yes or no" (Tr. 317).

* * * * * * *

"The Court: And let me ask you another question while we're on this thing. You see that $3,894.53 you told the jury was assets?

The Witness: Yes, sir.

The Court: Read to them what it is.

The Witness: Stamps, stationery, office expense, electric, telephone, truck expense, gas, oil, so forth, promotional expense, insurance, for one year.

The Court: Every one of those items is an expense item, isn't it?

The Witness: Yes, sir.

The Court: And it isn't an asset. That's an expense item that you take as part of the expenses of operating the company. That's a deduction, isn't it?

The Witness: Well, your Honor, the stamps, stationery and office, that certainly is an investment.

The Court: It isn't an investment. It's what you spent during the year. You didn't keep the stamps. You paid that out.

The Witness: But we also had a good part of that stationery left over.

The Court: Electric——

The Witness: Electric, of course, was——

The Court: ——telephone, truck expense, gas and oil, promotional expense, insurance for one year, attorney, an-

ditor expense, commissions paid, necessary business travel expense.

You just got through telling the jury that that is an asset, and right at the top it says 'other deductions,' if you'll read just what it says at the top.

The Witness: Well, Your Honor, with all respect to the court, I was in the opinion it was——

The Court: You now see it is?

The Witness: Part of it, I can understand.

The Court: Well, it all isn't, I'm not going to argue with you.

Now, one other item: You told this jury—you looked at this schedule here, and it's the compensation of officers, and you said $18,575, didn't you?

The Witness: Yes, sir.

The Court: And your attorney asked you how much of that you got?

The Witness: Yes, sir.

The Court: And you told him $7,000, didn't you?

The Witness: Plus 6,000——

The Court: I didn't ask you that. You said you got 6,000 commissions, but you said of the salaries that you got $7,000, and that your mother and father got the balance.

The Witness: Yes, sir.

The Court: Now, tell this jury what that return shows.

The Witness: Robert A. Woodring, $12,400; Robert W. Woodring, 4,925, and Florence W. Woodring, 1,200.

The Court: And you didn't even show that figure on your own personal income tax return, did you?

The Witness: Yes, sir, I did.

The Court: Well, I leave it to the jury as to what you said. You said this morning, I haven't looked at it, but I followed you this morning without looking at it, and my recollection is that you said you got $7,000 of that, and the rest of it went to your mother and father.

Mr. Bigler: I don't think that's correct, your Honor, with all respect too.

The Court: Well, I'll defer to the record. The jury understands that they'll have to remember. It was either six or seven, and the other was commissions.

Mr. Bigler: I think that was right, but I don't think he took one separate item and held that out, that was all he got.

The Court: Just listen to what I said. He said this morning, as I understand him, and the jury understands they have to remember the testimony, but as I understood him, he said he drew as a salary from the corporation $7,000. Now, it was either six or seven, and that the balance was paid to his mother and his father, and that he drew the reverse, which was—one was six and the other was seven, was commissions, and that he made a return on the $13,000 and some odd dollars, and in the very item that he read from, to give you the figure, it shows, when they made this return, I don't know whether you have looked at it or not——

Mr. Bigler: Yes, I have, your Honor.

The Court: But it shows right here as officers' salaries, president $12,450, Robert W. Woodring, secretary-treasurer, 4,925, and Florence W. Woodring, 1,200.

Now, those two are the ones he said this morning that drew over $11,000.

The Witness: Your Honor, may I explain that, please?

The Court: I'm not asking you to explain anything. I'm just calling your attention to what you told this jury this morning, after looking at that. I didn't look at it until a few moments ago.

The Witness: Your Honor, I can explain this here very easily, with my income tax return, and this here. I can explain this very easily. I haven't tried to misrepresent, or I haven't tried to tell the jury anything wrong. 18,000——

The Court: Let me ask you this: Did or did you not this morning tell them that your mother and father got over $11,000?

The Witness: Yes, sir, I did.

The Court: You did tell them that?

The Witness: That's right.

The Court: And that is not true, is it?

The Witness: I can see now where it is not true no, sir, looking on the reverse side.

The Court: That's the very thing you looked at this morning.

The Witness: No, sir, this is what I looked at this morning, right here (indicating), 18,575, compensation of officers, Schedule E.

The Court: You had that before you. I don't know what you looked at, but you had it before you.

Q. (By Mr. Bigler) Well, the upshot of it was that you reported how much as total income for yourself from the company, Mr. Woodring?

The Court: Where is the other one? Let me see it.

Mr. Bigler: I think he has them both now, your Honor?

The Witness: Is that correct, your Honor?

The Court: You're doing the testifying. It isn't correct according to that. Read on there and look at that, and see what it says you got the $6,000 for.

The Witness: I got $6,450 paid in wages from Youngstown Home Improvement, and it goes on to the other one, I received $6,000 in bonus which makes a total of $12,450.

The Court: Doesn't say a thing about commissions, does it?

The Witness: Bonus, commission, your Honor.

The Court: Well, it says I'm not talking about what it's for, I'm asking you what it says there. That's what you turned in. What does it say?

The Witness: $12,400.

The Court: Says $6,000 bonus, doesn't it?

The Witness: Yes, sir.

The Court: You can proceed.

I mean you're not dealing, Mr. Witness, in those things,

it's a matter of picking them up and reading them. I'm not trying to cross-examine you or anything on them, but when you start and tell this jury about things that are in black and white on there, the least you can do is read them the way it is put on there. You can make any explanation you want to after you read them, but be good enough, if you're referring to a document, to correctly set out what it says, and then put any interpretation you want to. You're entitled to make any explanation you want to about it, but don't misread the document.

(Whereupon, the following proceedings were had in the presence, but out of the hearing of the jury):

Mr. Bigler: I object to the court indicating that the witness misread the documents, your Honor, and casting the court's point of view on the credibility of the witness on making these particular statements at this time, since I think that while I know the court can comment on the evidence, that such comments as were made by the court at this time reflecting on the believability and credibility of the witness' testimony were unnecessary in view of all the evidence previously given in the case, and that it unduly prejudices the jury against him by reflecting the court's attitude on this witness' testimony.

That's all.

The Court: Be overruled for the reason that the documents themselves have previously been offered and admitted into evidence, and the only reason that I raised it was because we permitted them to refer to them and read from them in the interest of saving time, and I merely questioned him because it was obvious to the court he had been misreading.

Mr. Bigler: That is the basis of my objection, your Honor. I think that the court is assuming the function of the jury in the concluding of the believability of this witness' testimony from these documents.

The Court: Be overruled. You can proceed" (Tr. 339-346).

* * * * * * *

"Q. I believe you said that the profit of the corporation for 1959 was $6,378, approximately so?

A. That profit, that's the equipment. If we take that amount with the amount that was——

The Court: Take a look at it before you start talking about something you don't know what you're talking about, I think, and see what it says. You're talking about what you filed. Just look at the front of it. He asked you what the profit was, he didn't ask you about the equipment. Turn over on the front and see what you paid taxes on.

The Witness: 6,778.87" (Tr. 371).

* * * * * * *

"The Court: Well, in order to help you, Mr. Witness, you're evidently talking about something you're confused about. Look on the schedule that you've got there and see what you're valued at at the end of the year. If you will turn over on the back of that thing you'll see an asset outfit you signed.

You don't have to look at your attorney. Here, let me show it to you.

The Witness: Your Honor, I'm really confused.

The Court: I'm not talking anything about that. I'm just saying to you if you will turn over—see what that thing says, the top of it?

The Witness: Cash, eighteen hundred——

The Court: No, no, the top.

The Witness: Balance sheet, Schedule L, balance sheet. Total liabilities and capital, 6,378.87, the same as on the front.

The Court: Well, that hasn't anything to do with the front. This is the balance sheet. This over here, Mr. Wit-

ness, is what you made, and you were supposed to pay that much tax. This shows your capital investment of a thousand dollars, it shows the cash, it shows your accounts receivable, and for your information, there is the property that you keep talking about $3,818.14.

The Witness: That's the depreciated.

The Court: Well, that's the value of it on your balance sheet at the end of the year.

The Witness: Well, I'm not too familiar with that type of operation, your Honor, that's the reason I had my accountant take care of it.

The Court: He prepared it, presumably, from your books, and that's what he sets out there.

The Witness: Yes, sir, he did.

The Court: Of course, just to look at it, from the preparation, if you put a thousand dollars in, and you made sixty some odd hundred dollars and you didn't take a dividend, you balance out pretty good. Take a good accountant to tell you how, but that's what it shows" (Tr. 372-373).

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In the Supreme Court of the United States

October Term, 1962

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CITATION

Rule:

Rule 48, Federal Rules of Criminal Procedure 2, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 971

ROBERT A. WOODRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19–31; R. V, 1–13)[1] is reported at 311 F. 2d 417.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1963 (Pet. App. 32; R. V, 14). A petition for rehearing was denied on February 1, 1963 (R. V, 15). Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including April 2, 1963. The petition was filed on April 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] We will refer to the five-volume record by their Roman numerals, except that Volumes II and III, which contain the trial transcript, will be referred to as "Tr."

QUESTIONS PRESENTED

1. Whether the trial court's examination of defense witnesses and its comments during their testimony deprived petitioner of a fair trial.

2. Whether the court erred in dismissing one count of a seven-count indictment at the close of all the evidence on motion of the government, instead of directing a judgment of acquittal on this count.

RULE INVOLVED

Rule 48 of the Federal Rules of Criminal Procedure provides in pertinent part:

DISMISSAL

> (a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.
>
> * * * * *

STATEMENT

Petitioner was tried in the United States District Court for the Eastern District of Missouri, on a seven-count indictment charging use of the mails and interstate wires in a scheme to defraud. The scheme alleged was that petitioner, as president of Youngstown Home Improvement Company, would induce persons to invest by falsely representing that he needed partners in a profitable company which had substantial inventory. At the close of the government's case petitioner's counsel moved for a directed verdict

of acquittal on all seven counts of the indictment, but the court reserved its ruling (Tr. 205). At the conclusion of all the evidence, count 6 was dismissed on motion of the government. Petitioner's counsel then moved the court to dismiss the other counts (1–5 and 7), and the court reserved its ruling (Tr. 388–389; R. IV, 2, 5, 15). The jury acquitted petitioner on counts 1, 2, 3, 5, and 7 and convicted him on count 4 (Tr. 390–391). The court ultimately refused to dismiss count 4 and petitioner was sentenced to imprisonment for three years (R. I, 28). On appeal, the conviction was affirmed.

Count 4, on which petitioner was convicted, rested on his dealings with Leonard Herman. Herman answered petitioner's advertisement of June 26, 1960,[2] which read as follows (Tr. 186, 197):

> Man who is honest and sincere and is seeking same with a Gentile partner: I have a very profitable and expanding business but need a partner to expand: $6,000 required; references.

After negotiations, on August 8, 1960, Herman and petitioner signed a contract which stated that Herman would purchase 50 shares of Youngstown from petitioner; that only 100 shares of Youngstown were outstanding; and that Youngstown would have $12,000 in assets upon closing the deal no later than August 10, 1960 (Tr. 188, 191, 351–352). On August 10 Her-

[2] The counts on which petitioner was acquitted related to persons who had made investments prior to Herman (Tr. 11, 43–44, 46, 84–85, 121–122, 125–126, 167, 171–172). Dissension arose between petitioner and the investors, and, by June 1960, some of them were pressing him for a return of their money. (Tr. 71, 93–94, 254–256, 262–263).

man gave petitioner his check for $6,000 and received a stock certificate for 50 shares (Tr. 191–192). The two men then went to the Lindell Trust Company and signed a card providing that their two signatures were necessary to make withdrawals from Youngstown's account (Tr. 192–193). On that date the balance in Youngstown's account was $6,504.69 (Tr. 193). Petitioner deposited Herman's $6,000 in petitioner's personal account (Tr. 352). According to petitioner's testimony, "within the hour, the same time," he withdrew $6,000 from the Youngstown account without Herman's signature, and on August 11, 1960, the account was overdrawn $206.73 (Tr. 193, 352–353). Petitioner testified that he took the $6,000 from the Youngstown account for sales commissions due him, but that this left the corporation with $12,000 in assets represented by equipment, signed contracts, and accounts receivable (Tr. 353). Petitioner also testified that at the time Herman came into the corporation, he (petitioner) was "about to lose everything" (Tr. 376, 378). Petitioner had only 23 shares of Youngstown after he had transferred 50 shares to Herman. Petitioner testified that he intended to purchase outstanding shares of other investors so that he and Herman would both own 50 percent, but no evidence of such attempts to purchase was introduced (Tr. 376–380).

On August 11, 1960, the day after petitioner obtained Herman's $6,000, petitioner telephoned Herman that upon the advice of his doctor he was taking a vacation (Tr. 194, 355–356, 385). During the next 40 or 45 days, Herman went to the corporation office

on four or five occasions but always found it closed (Tr. 195–196). Wekerle, one of the other investors, also testified that after August 10, 1960, he could not get into the office (Tr. 131).

ARGUMENT

1. The questioning by the court of defense witnesses Wicks (Tr. 209, 224–226, 232–233, 236–237), Mulligan (Tr. 248–249, 269), and petitioner (Tr. 317, 339–346, 371, 372–373) is set out verbatim at Pet. App. 34–45. We believe a reading of this portion of the record refutes petitioner's contention (Pet. 5–7) that he was deprived of a fair and impartial trial by reason of the zeal of the trial court. Indeed, petitioner's counsel himself implicitly recognized that the trial court's actions were proper by failing to object, except on one relatively unimportant occasion, to the court's questions and comments.

It is true that the court of appeals did criticize the district court's "injudicious statements and vigorous cross-examination" (Pet. App. 23). We doubt, however, whether this criticism was justified. As to witness Wicks, an architect for Youngstown, the court brought out that the incidents which the witness had difficulty relating had not occurred as long ago as the witness stated; that his memory was hazy as to the names of construction jobs and his part in making sketches for them; and that his valuation of the business at $100,000 was based solely upon what he had heard from petitioner (Pet. App. 34–37). As to the witness Mulligan, Youngstown's attorney, the court's questioning disclosed that the

witness erred in his testimony as to when he first represented petitioner and that Youngstown had held a shareholders', as distinguished from a directors', meeting (Pet. App. 37–39). The court could justifiably express surprise that an attorney answered incorrectly questions relating to matters reflected in documentary evidence (Pet. App. 38–39). The colloquies with petitioner merely exhorted him to answer the questions asked and to be certain of his testimony. They also disclosed that, in referring to his own and Youngstown's income tax returns, petitioner had made mistakes in reading parts of them. The court properly admonished petitioner not to misread documents which had been introduced in evidence (Pet. App. 42–44).

In any event, the court of appeals properly found that the judge's participation did not warrant reversal of the conviction (Pet. App. 24–29). In his charge, the judge specifically stated that the jury should not assume from the court's questioning of witnesses what the court's opinion was of the case; that, moreover, it was the sole responsibility of the jury to determine the credibility of the witnesses; and that the jury may disregard any of the court's comments in making its findings (R. IV, 4–5).[3] The

[3] The charge included the following (R. IV, 5): "During the course of the trial I occasionally ask questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions relate. Remember that at all times that you as jurors are at liberty to disregard all comments of the court in arriving at your finding as to the facts.

"If in the course of these instructions, and if during the trial, I have said anything that indicates to you how the court might feel, or how you think the court feels with respect to

challenged remarks by the trial court—which were not directly related to count 4—obviously did not have a coercive effect since petitioner was acquitted on all the other counts, which related to investments by others occurring before that on which count 4 rests. Thus, the jury plainly followed the court's instructions and itself weighed the credibility of the various witnesses.

2. The trial court did not err in dismissing count 6 of the indictment at the close of all the evidence, rather than, as petitioner now argues, directing a judgment of acquittal on this count. After count 6 was dismissed, petitioner himself moved "that the court dismiss" the other counts (Tr. 388–389). It is thus evident that petitioner was completely satisfied with dismissal of count 6, and tacitly gave his consent as Rule 48 of the Federal Rules of Criminal Procedure (*supra*, p. 2) requires.

Furthermore, even if petitioner had not consented to the government's dismissal, his contention is without merit for two additional reasons. First, the reason for requiring consent to dismissal under Rule 48 is to retain the common-law rule that a *nolle prosequi* with the consent of the defendant, as distinguished from an acquittal, would permit reindictment. The dismissal in this case, however, at the close of the

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the testimony in this case, and that opinion is different from your opinion of the testimony, you are to accept your opinion of the testimony rather than the court's, because it is your sole province to pass on the testimony, and from the testimony you pass on the credibility of the witnesses, and with that the court has nothing to do, just as you, as members of the jury, have nothing to do with determining what the law is in this case."

evidence, was obviously understood by all parties to be with prejudice and the government has no intention of reindicting or retrying the petitioner under count 6. Consequently, petitioner here has obtained the full protection which the consent requirement of Rule 48 was designed to provide. Second, if the government ever did attempt to retry petitioner on count 6, he could then argue both that the dismissal was with prejudice and that, since he has already been tried on this count and it was dismissed without his consent, retrial would constitute double jeopardy. He cannot now seek review of this issue when he has not been harmed.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

APRIL 1963.

[4] Petitioner argues (Pet. 8) that, whereas counts 1, 2, 3, 5, and 7, on which the jury acquitted petitioner, dealt with activities earlier than count 4 on which he was found guilty, count 6 concerned events one day later than those in count 4 and therefore the jury would have seriously considered an acquittal on count 6. But the mailing charged in count 6 was to the same person involved in count 5 whose investment in the company preceded the negotiations with Herman. In any event, it is sheer speculation to suggest that the jury would have considered a judgment of acquittal different than it considered the dismissal.

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